No. 86-1733

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C.,

Petitioner,

v.

DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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1. The government's opposition strenuously attempts to recast the court of appeals' opinion as resting upon purported evidentiary findings that Mr. Hubbard actually exercised real management authority in 1984, at the time the deposition was noticed, and subsequently. From his premise, the government then argues that the court's reliance on Mr. Hubbard's spiritual and religious position was but one factor—and a minor one, at that—in its ultimate decision, and that the court of appeals' reliance on the "possibility" that Mr. Hubbard might reassert a managerial role in the future[1] was not a basis of decision at all. Only by so reformulating the court of appeals' decision is the

[1] The government's attempted distinction between an "abstract" possibility and an "undisputed" possibility (Br. Opp. at 10) is

(footnote continued on following page)

government able to argue that this case involves nothing more than a factual dispute over a mere discovery issue, not warranting Supreme Court review.

The government's attempt to rewrite the court of appeals' decision must fail. Full analysis of the court of appeals' decision compels the conclusion that it is founded, in all respects, precisely upon Mr. Hubbard's spiritual influence in Scientology and upon speculations about the possibility that he might exercise a future management role over petitioners, and *not* upon a shred of evidence or a finding that he actually was a managing agent at the time the deposition was noticed. The government's selective quotations of portions of the court's opinion, out of context, are disingenuous, at best.

Thus, the government argues that the court of appeals "cited the 'uncontested' evidence that . . . [Mr. Hubbard] remained in control of [the churches'] ecclesiastical, administrative and financial affairs" subsequent to *1966* (Br. Opp. at 4, 9), a point never contested by petitioners, but ignores the uncontested evidence that they did *not* remain in control of such affairs *after* 1982, and did not exercise such a role in 1984. Indeed, the government ignores the fact that the court of appeals itself acknowledged that there was no evidentiary basis of an actual management role after 1982, that the only evidence with respect to the post-1982 period was the petitioners' evidence refuting any such allegations, and that the court was not free to resolve

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(footnote continued from previous page)

meaningless. A possibility is a possibility; until it is realized, it is not a reality. The court of appeals' new rule that individuals who "undisputably" possibly may exercise a managing agent role in the future is contrary to well established law, vastly expands the range of persons vulnerable to compulsory depositions, and widens the room for discovery abuse available to litigants. See Petition at 16-18.

such factual issues against the petitioners on the basis of the written record. 802 F.2d at 1455, n.10 (Pet. App. 27a).

Similarly, the government twice quotes the court of appeals' conclusory holding that "Hubbard continued through 1984 not only as the potential leader of the Scientology organization but as the actual leader" (Br. Opp. at 5, 10), mischaracterizing it as a finding based upon evidence of actual present management. In fact, the court of appeals' statement was premised on nothing more nor less than its *conclusion* that Hubbard was the "leader" or managing agent of petitioner *as a direct result of his role as spiritual and religious leader,* and not upon evidence of actual day-to-day management or control. Thus, immediately after the above-quoted passage, the court of appeals went on to state as follows:

> Even as Hubbard may have sought to distance himself, for whatever reason, from administrative details and to separate his business affairs from the Scientology apparatus, the evidence before the District Court demonstrated that Hubbard retained his preeminence as spiritual or ecclesiastical head of Scientology. The basic structure of belief for Scientology dictates that no one can replace him in this role. [ft omitted] In this essential sense, Scientology remained his alter ego despite the passive role he sought to assume. In an organization which claims to derive its purpose from Hubbard's writings and sayings, the role that Hubbard continued to play in Scientology affairs could scarcely be viewed in law or in practical judgment as a figure of lesser status than that of a managing agent.

(Pet. App. 29a-30a)

Thus, ultimately the court of appeals' decision holds that a living founder or spiritual leader of a church or religious

movement may be noticed as a managing agent, even if he does not meet the secular criteria of managing agent applied in all other contexts and even if, as the court of appeals acknowledged with respect to Mr. Hubbard, he has "distance[d] himself . . . from the administrative details" (Pet. App. 29a) of the church or movement. The court of appeals' decision further holds that a church may be deprived of its statutory and constitutional rights to sue for vindication of its substantive civil rights if it is unable to produce its spiritual leader at a deposition, even where there is no evidence that he presently exercises management authority or that he presently controls or is controlled by the church's management.[2] In reaching such conclusions, the court has fundamentally confused two concepts. A spiritual leader is the source of spiritual, religious or philosophical thought or doctrine; a managing agent is one who exercises day-to-day control over administration. Indeed, L. Ron Hubbard remains the spiritual leader of Scientology Churches despite his death in January, 1986; no one has or could replace him in that role. Presumably, even the court of appeals would not reach the absurd conclusion that Mr. Hubbard is still the managing agent of the Churches. Yet there was no more basis in the record to demonstrate that Mr. Hubbard exercised any *managerial* powers in 1984 than there is today. By overlooking such critical distinctions, the court of appeals created a special, onerous and entangling rule for religious organizations which runs directly counter to the entire body of First Amendment jurisprudence announced

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[2] The court of appeals' conclusory statement that the Church was Mr. Hubbard's alter ego was also based precisely on his spiritual influence and role, and not upon a shred of evidence that the usual legal criteria for "alter ego" status were met. Thus, the court's "alter ego" conclusion cannot properly be invoked as a justification for imposing a finding of wilfulness upon the petitioners resulting in dismissal of their lawsuit.

by this Court. Certiorari should be granted to correct the dangerous precedent established by the court of appeals' opinion.

2. The government argues that the principles enunciated in cases such as *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1871); *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Presbyterian Church* v. *Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440 (1969); and *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976), are not applicable in the present context, but are limited to cases involving intrachurch disputes. The government's argument improperly and artificially restricts the scope of those decisions. The core principle which those cases proclaim is that the government, including the judiciary, may not interpret, reformulate or determine matters of internal church doctrine, policy or governance. The reason for the rule—to permit church bodies to determine such matters for themselves without government coercion or entanglement—has nothing whatever to do with the particular context in which such disputes arise. While in the present case the issue originally arose in a discovery context, the court below redefined church governance pursuant to a newly developed standard applicable only to certain kinds of religious organizations. When the petitioner churches were unable to conform to the judiciary's redefinition of their management structures, the courts deprived them of access to the federal courts on their claims of fundamental civil liberties violations. We submit that such a result is precisely what is prohibited by the cases upon which petitioners rely.

Thus, in *Watson* v. *Jones*, this Court established that courts cannot substitute their own evaluation of religious doctrinal matters for that of the religious institutions involved, and must accept the reasonable decisions of church

officials as binding in the case at hand. 13 Wall. at 727. In the instant case, the court of appeals ignored or disregarded the unrefuted statements of the boards of directors of all of the class member churches establishing that Mr. Hubbard had *no* current managerial role in any.[3]

In *Kedroff*, a state court evaluated the doctrines of a church for the purpose of determining entitlement to church property. Basing its reversal on First Amendment prohibitions, this Court also explained the significance of *Watson* v. *Jones*, noting in part:

> The opinion radiates however, a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

Kedroff, 344 U.S. at 116.

The clergyman improperly selected by the state court as the leader of the religion in *Kedroff* was the leader of

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[3] Throughout the government's brief it makes repeated references to alleged facts in the record of this case concerning purported activities of the Church and Mr. Hubbard. Many of these statements are false or misconstrued. For example, the government claims that in another case (in 1979) church officials stipulated to criminal conduct and that the magistrate in this case thus ruled that the government could raise a defense of "unclean hands." The Church members (who were removed from any staff positions prior to 1982) merely stipulated to the introduction of certain evidence at trial, and the magistrate in this case merely declined to preclude the defense of unclean hands at that stage of the case, permitting discovery to go forward in the event that the defense was permitted. (See Pet. App. 15a.) The government's various allegations of Mr. Hubbard's involvement in the criminal case, and his purported control over Church financial matters for the periods at issue in the lawsuit (Resp. Br. at 4-5) are wholly without evidentiary basis, and are in any event irrelevant, the events having allegedly occurred nearly a decade prior to the deposition request in this case.

the United States branch of the organization, able by his judicial selection to exercise control over church properties. Here, judicial determination that Mr. Hubbard's "spiritual preeminence" made him "at least a managing agent" of all Churches of Scientology and that it made the Church his "alter ego" is no less invidious or constitutionally infirm.

In *Presbyterian Church* v. *Mary Elizabeth Blue Hull Mem. Presbysterian Church*, 393 U.S. 440 (1969), also arising factually out of a church property dispute, the Court condemned a judicial "departure from doctrine" analysis to determine the proper faction entitled to control church assets:

> Thus, the departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role.

Hull, 393 U.S. at 450.

Similarly here, the court of appeals predicted the *future* application of Scientology beliefs to find that the basic structure of belief for Scientology dictated that no one could replace Mr. Hubbard as spiritual or ecclesiastical leader and that he thus must be viewed to be a managing agent.[4] Such an evaluation raises constitutional issues of comparable proportion to those decided in *Hull*, *Watson*, *Kedroff* or *Serbian Eastern*.

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[4] It should be noted that Mr. Hubbard's alleged "alter ego" has not perished since his passing in January of 1986, but rather has flourished and grown.

CONCLUSION

For the reasons stated above and in the petition, the petition should be granted.

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Respectfully submitted,

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